protection of the First Amendment. "Safeguarding the public's right to receive a diversity of views and information over the airwaves," because of the state of the Court's understanding of spectrum scarcity in 1990, is "an integral component of the FCC's mission."[51] Without any consideration of how the technology of telecommunications might have advanced since 1969 in such a way as to undercut the scarcity rationale, the Court quoted its opinion issued that year in *Red Lion*: "Because of the scarcity of electromagnetic frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[52] Thus the Court had no difficulty concluding, in the jargon of judicial review, that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective."[53]

As an initial matter, "diversity of expression" is a remarkably vague objective for the U.S. government to pursue, considering that it directly touches freedom of speech. Sometimes the phrase connotes diverse ownership (but not too diverse, as section 310(b) suggests, lest foreigners speak to us and fill our heads with foreign ideas). At other times, it connotes a nannyish concern that listeners and viewers receive their recommended daily amount of various intellectual and cultural nutrients—the informational equivalent of the USDA listings found on the sides of cereal boxes. At still other times, "diversity of expression" is a shorthand for the underwhelming argument, seldom expressly articulated, that diverse content can result *only* from the diverse ownership of media companies (and hence the diverse control of FCC licenses).

51. *Metro Broadcasting*, 497 U.S. at 567.

52. *Id.* at 566-67 (quoting *Red Lion*, 395 U.S. at 390). Justice White, author of *Red Lion*, was evidently the swing vote in *Metro Broadcasting*, a 5-4 decision. *See* Devins, *supra* note 49, at 125 n.6.

53. *Metro Broadcasting*, 497 U.S. at 567.

All of this ignores a basic point: A government-approved menu of diverse programming is something less than freedom of speech. If "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[54] how can it be the federal government's "important" function to judge whether electronic speech is sufficiently diverse? It is a formidable abridgment of speech when the government confers or withholds a person's opportunity to engage in electronic speech depending on whether his message or nationality or other lines of business comport with the government's preferred conception of "diversity." Only a Panglossian would suppose that an agency as politicized as the FCC would arrive at a definition of "diversity of expression" that was truly neutral with respect to content.

On engineering grounds, the spectrum-scarcity premise of *Metro Broadcasting*, *Red Lion*, and their predecessors is untenable. To the extent that it exists, the scarcity resulting from the finite supply of spectrum at any given moment is a problem that diminishes over time. The dynamic, as opposed to static, supply of usable spectrum depends on the state of communications technology, including the precision (and hence the cost) of transmitters and receivers. At any point in time, we could have more "diversity" if we were willing to pay the higher price to produce television receivers with more demanding specifications, or if we were willing to degrade the quality of radio transmissions somewhat by assigning more broadcast licenses in a given region.

Spectrum becomes less scarce whenever new technologies permit transmissions to be packed more densely into a given bandwidth or to be transmitted by radio at higher frequencies that are generally considered to be less desirable. One spread-spectrum technology known as "frequency hopping multiple access" reportedly can achieve a 27-fold in-

54. U.S. CONST. amend. I.

crease in the message-carrying capacity of a bloc of spectrum.[55] A more advanced technology known as "software radio" may one day offer virtually limitless spectrum capacity by enabling radio transmissions to shift continuously to unused frequencies across the entire spectrum.[56] Over the nearer term, in December 1992, TCI, the largest cable multiple system operator in the U.S., announced that it would use digital compression to offer its subscribers 500 cable channels.[57] While 500 channels are not yet available to consumers, similar digital-compression technology already developed by companies such as General Instrument and Scientific-Atlanta permits a dozen motion pictures to be transmitted simultaneously in the bandwidth currently used by a single over-the-air television signal. It is startling indeed to think that the scope of the First Amendment's protection of wireless electronic speech—so critical for the development of wireless telephony and wireless multichannel video, such as direct broadcast satellite service, "wireless cable," and local multipoint distribution service—could hang on a basic misconception of electrical engineering that could be corrected if the Justices were to peruse a random issue of *Broadcasting and Cable* magazine.

For a moment, however, assume counterfactually that not a single engineering breakthrough had been achieved in the spectral efficiency of radio transmission since 1934. The scarcity thesis still would be legally untenable because it relies on specious economic reasoning. All valuable goods are scarce. That is why the price of a product is almost always a positive number. Newsprint has a positive price because it too

55. *See* GEOTEK, INC., 1993 SEC FORM 10-K, at 6-8 (1994); GEORGE CALHOUN, DIGITAL CELLULAR RADIO 344-51 (Artech House, Inc. 1988).

56. Raymond J. Lackey & Donald W. Upmal, *Speakeasy: The Military Software Radio*, IEEE COMMUNICATIONS MAG., May 1995, at 56.

57. Edmund L. Andrews, *A Cable Vision (or Nightmare): 500 Channels*, N.Y. TIMES, Dec. 3, 1992, at A1.

is scarce, but that characteristic in no way justifies regulating who may own a newspaper or what he may say in it, even if the newsprint is made from the pulp of trees harvested from federal forest land.

There is nothing new about this reasoning. Nobel laureate Ronald Coase had this insight in a famous article in 1959.[58] Judge Robert Bork articulated it succinctly for the FCC's benefit in a decision for the D.C. Circuit in 1986.[59] And scholars in law, economics, and engineering before and since have explained the reasoning in exhausting detail.[60] Still,

58. Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

59. Telecommunications Res. & Action Ctr. *v.* FCC, 801 F.2d 501, 508 (D.C. Cir.) *(TRAC)*, *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

60. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 22, at 204–18; ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 188–90 (Scott, Foresman & Co. 1988); DOUGLAS H. GINSBURG, REGULATION OF BROADCASTING 58–61 (West Publishing Co. 1979); HARVEY J. LEVIN, THE INVISIBLE RESOURCE: USE AND REGULATION OF THE RADIO SPECTRUM 111–12 (Johns Hopkins University Press 1971); BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT (Ballinger Publishing Co. 1975); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 672–74 (Little, Brown & Co., 4th ed. 1992); POWE, *supra* note 22, at 199–209; MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES (Yale University Press 1986); Arthur S. De Vany, Ross D. Eckert, Charles J. Meyers, Donald J. O'Hara & Richard C. Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989); Hazlett, *supra* note 45, at 137; William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 718–19 (1989); Jora R. Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J.L. & ECON. 221 (1975); Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 255–62; Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1358–64 (1985); Leo Herzel, Comment, *"Public Interest" and the Market in Color*

the Supreme Court and the FCC continue to ignore such logic—no doubt because it calls into question the constitutionality of virtually everything that the FCC does.[61]

Intrusion. The Supreme Court's second rationale for the second-class status of broadcasters under the First Amendment is the notion that broadcasting is an "intruder" that is "uniquely pervasive" and "uniquely accessible to children."[62] The intrusion rationale purports to justify draconian regulations such as the ban on "filthy words" in *Pacifica*. It forces the conclusion that certain types of programming that some consumers desire may be barred from the air because some other consumers do not desire such programming. While the scarcity argument permits substitutions for what a broadcaster would prefer to air, the intrusion argument permits complete bans. Thus, intrusion supports direct censorship, while scarcity supports indirect censorship at worst.

Furthermore, it is unclear how exactly broadcast media may be cast in the role of intruders. Radios and televisions, after all, are not forced on the public. We buy them willingly and consider them among out most prized possessions. The same can hardly be said for intruders. In addition, even if broadcast media could be equated with intruders, this hardly distinguishes them from newspapers, magazines, or books. In each instance, the product is voluntarily brought into one's home yet may have scandalous contents. For example, many newspapers run photos and stories depicting risque and bloody

Television Regulation, 18 U. CHI. L. REV. 802 (1951); Abbott B. Lipsky, Jr., Note, *Reconciling* Red Lion *and* Tornillo: *A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 575–79 (1976).

61. The Supreme Court has discarded the notion of scarcity in the cable television arena, *Turner Broadcasting*, 114 S. Ct. at 2457, but has yet to do so elsewhere.

62. *Pacifica*, 438 U.S. at 748–49. For penetrating analysis of the intrusion rationale upon which this discussion is based, see KRATTENMAKER & POWE, *supra* note 22, at 219–21; SPITZER, *supra* note 60, at 124–30.

acts. Surely, some newspaper readers find this offensive. Yet this obviously did not make those newspapers "intruders" subject to regulation. Neither should offensive material cause such a spurious classification for broadcast media.

Of course, the Court in *Pacifica* may have meant broadcast media were intrusive because they were "uniquely pervasive," rather than unwanted. This, too, is factually untenable. At bottom, then, *Pacifica*'s notion of broadcast media as an intruder may simply rest on the intersection of the First Amendment and protecting the delicate constitutions of children.

Power. First Amendment scholars Thomas Krattenmaker and Lucas Powe suggest that cases such as *Pacifica* may also imply a more fundamental justification for regulating broadcast speech—namely, that broadcasting is too powerful a force to be left unregulated.[63] This notion has been with us at least since the days of Marshall McLuhan, and made national headlines when espoused by Vice President Spiro Agnew.[64] A former FCC chairman asserted in 1985 that television is so powerful that there is no genuine substitute for televised information.[65] But what kind of power does broadcasting, and particularly television, actually possess?

The basis of the power hypothesis today is the extraordinary amount of television that Americans watch, and its supposed credibility in the eyes of the public. The average person watches almost seven hours of television per day, almost two-thirds of the public uses it as their primary source of news,

63. KRATTENMAKER & POWE, *supra* note 22, at 221-24.

64. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (New American Library 1964); N.Y. TIMES, Nov. 14, 1969, at 24 (text of Agnew's speech).

65. *See* Charles Ferris & James Kirkland, *Fairness—The Broadcaster's Hippocratic Oath*, 34 CATH. U. L. REV. 605 (1985).

and almost half rank it as the most believable news source.[66] Yet this sort of logic suggests that before the heyday of broadcast media, when most people read and trusted newspapers as their vital source of information, newspapers should have been entitled to lesser First Amendment status as well. The existence of *Near* and *Grosjean* in the 1930s refutes such reasoning.

There are reasons to reject general regulation of broadcast media based on its supposed power. First, the notion of power does not distinguish between those outlets with power and those that lack it. Thus, the theory fails to explain why the smallest local television station is more powerful than, say, the *New York Times* or the *Washington Post*. Second, the power rationale seems rooted in the fear that those with power will abuse it. But history has shown all too often that regulators commit abuses in pursuit of illusory malefaction by broadcasters. Third, the theory is a sad commentary on our nation in that it suggests a populace of mindless automatons manipulated from afar by faceless men who direct broadcast programming.[67] In short, the power hypothesis may explain why broadcast regulations exist, but it fails to justify them and to provide the constitutional rationale for the different protections of speech afforded print and broadcasting.

Public Property. The only rationale rooted in precedent and logic that might justify lesser First Amendment protection for broadcast media stems from government ownership of the broadcast spectrum. Since the Radio Act of 1927, the government has claimed ownership of the spectrum. From ownership follows control. As the Supreme Court mused, "it is hardly lack of due process for the government to regulate what it

66. BROADCASTING YEARBOOK, at A-3 (Broadcasting Publications, Inc. 1991).

67. *See* Louis Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 787 (1972).

subsidizes."[68]

The government could be said to have subsidized broadcasters at one time. The initial licensee on any given frequency received a kind of government largesse. But more than 90 percent of the radio and television station licenses held today were acquired in the secondary market at fair market value.[69] And although broadcasters who purchase stations from previous holders enjoy FCC policies that limit competition by limiting spectrum usage, the value of that restraint on competition would have been incorporated into the purchase prices of stations.

Naturally, these subsidies, to the extent that they exist, may appear unjustified to those who do not enjoy them. But even if it is the case that only wealthy individuals, or large corporations, can own a station and communicate through broadcasting, that condition also holds for newspaper ownership. In a capitalist economy, those with more resources have more choices. That fact should not affect whether one will receive constitutional protections.

This basic conclusion does not change even if one casts government ownership of the spectrum in constitutional terms. In particular, the spectrum may be viewed through traditional public forum analysis. "Traditional public fora" are places, such as parks and streets, that the public has long used for communication and expression.[70] Government regulations on the content of speech in a public forum are subject to strict scrutiny—that is, they must be narrowly drawn to advance a compelling governmental interest.[71] Content-neutral regula-

68. Wickard *v.* Filburn, 317 U.S. 111, 131 (1942).

69. PROGRESS & FREEDOM FOUNDATION, THE TELECOM REVOLUTION: AN AMERICAN OPPORTUNITY (May 1995).

70. *See, e.g.*, Perry Educ. Ass'n *v.* Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); International Soc'y for Krishna Consciousness *v.* Lee, 112 S. Ct. 2701 (1992).

71. *Perry*, 460 U.S. at 45.

tions (such as time, place, and manner restrictions) are subject to intermediate scrutiny. They are permissible if narrowly tailored to serve a significant governmental interest, and if they leave open sufficient alternative channels of communication.[72]

"Designated public fora" are created when the government makes property available for use in public expression.[73] Speech in such fora is protected identically with speech in traditional public fora. But the Supreme Court gives the government wide latitude in deciding what is a "designated" public forum.[74]

"Nonpublic fora" are governmental properties not intended for communicative purposes. Military bases are a prime example.[75] Speech regulations on such fora are subject to far less scrutiny. Time, place, and manner restrictions are permitted, and the government may also "preserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[76]

With this framework in mind, the broadcast spectrum can be viewed in public forum terms. Perhaps the spectrum is a designated public forum. Speech is permitted on the airwaves, if licensed, and the government may (at least by licensing) regulate the time, manner, and place of speech. Use of this doctrine blunts the argument that government ownership necessarily means government control. Thus, content-based regulations should be presumptively invalid.

But perhaps the spectrum is instead a nonpublic forum.

72. Police Dep't of Chicago *v.* Mosley, 408 U.S. 92, 94–95 (1972).

73. *Perry*, 460 U.S. at 45; Widmar *v.* Vincent, 454 U.S. 263 (1981).

74. *See, e.g.*, Cornelius *v.* NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); United States Postal Serv. *v.* Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 126–31 (1981).

75. Greer *v.* Spock, 424 U.S. 828, 838 (1976).

76. *Perry*, 460 U.S. at 46.

In this case, the Court can sustain broadcast regulations on essentially any ground that Congress advances to justify them. The problem is that the Court has not attempted this forum-selection analysis, and precedent in the area is sufficiently murky to preclude us from predicting what type of forum the Court would designate the spectrum to be.

The biggest problem with the public ownership argument is that it proves too much. Government ownership of the airwaves stems purely from a legislative decision in 1927 to claim ownership, notwithstanding the prior use of the spectrum by "homesteaders." Some of these spectrum homesteaders challenged the nationalization of the spectrum as an uncompensated taking in violation of the Fifth Amendment; their legal theory was too far ahead of its time, however, and the homesteaders failed.[77] What if Congress were next to decide that it owns the *air* as well? Could the government then demand that all communication traveling through the air conform to rules? This seems ludicrous, but it does not differ fundamentally from the status quo. By what right, after all, did Congress claim control of the broadcast spectrum? To answer this question, one must fall back to the scarcity argument, which has already been discredited.

Summary and Conclusions

This brings us full circle. There are no relevant distinctions between broadcasting and print. None of the proffered rationales survives logical inspection. To be sure, the Court may be unlikely to undo nearly seventy years of constitutional error. "Although courts and commentators have criticized the scarcity rationale since its inception," the Court said in *Turner*

77. White *v.* Johnson, 282 U.S. 367 (1931); Trinity Methodist Church, South *v.* FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); City of New York *v.* FRC, 36 F.2d 115 (1929), *cert. denied*, 281 U.S. 729 (1930); United States v. Gregg, 5 F. Supp. 848 (S.D. Tex. 1934).

Broadcasting in 1994, "we have declined to question its continued validity for our broadcast jurisprudence."[78] Thus the Court may simply continue to sustain broadcast regulations on whatever grounds seem plausible at the time. That possibility would require assessing the foreign ownership restrictions on the assumption that the First Amendment is not a major barrier. But it seems equally, if not more, likely that the Court will gravitate away from its antiquated conception of wireless communications as technological innovations in telecommunications produce a growing number of examples familiar to the average consumer of how spectrum is becoming abundant rather than scarce.

RADIO AND TELEVISION

Radio and television broadcasting have traditionally been subject to regulation that aims at the lofty goals of promoting diversity of programming content and diversity of media ownership. It is useful to review the zealotry with which the FCC has pursued its notion of diversity, because such a review makes clear the agency's logical inconsistency in limiting foreign ownership, which by its inherent nature would increase the diversity of media ownership in the U.S.

Diversity of Programming

In 1960, the FCC issued its *Programming Statement*, which reflected the agency's belief that radio and television licensees should offer the public diverse programming.[79] The FCC listed the fourteen components of a balanced programming

78. 114 S. Ct. at 2457 (footnote omitted).

79. Network Programming Inquiry, Report and Statement of Policy, 25 FED. REG. 7291 (1960) [hereinafter *1960 Programming Statement*]. The definitive analysis of this regulatory policy is KRATTENMAKER & POWE, *supra* note 22, at 76–81.

diet, ranging from the obvious (news, weather, sports) to the ethereal ("Opportunity for Local Self-Expression").[80] The FCC further stated that if a broadcaster was responsive to the "tastes, needs and desires" of his community, "he has met his responsibility."[81] Thus, the FCC's pursuit of diverse programming began with platitudes that seemed difficult for a conscientious broadcaster to avoid fulfilling in his ordinary self-interested pursuit of profit. Nevertheless, the FCC required broadcasters to explain failures to sufficiently diverse programming in renewal proceedings.[82] Naturally, the threat of being denied renewal of one's license was a sword of Damocles over broadcasters' heads. By 1984, however, the FCC realized that expanded markets virtually guaranteed that broadcasters would meet requirements for diverse programming, so the guidelines no longer served a purpose.[83]

Diversity of Opinion and the Fairness Doctrine

The "Fairness Doctrine" required broadcast licensees to "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[84] The FCC began its entanglement with fairness in its 1949 *Report on Editorializing by Broadcast Licensees*, requiring broadcasters to provide

80. 25 FED. REG. at 7295.

81. *Id.*

82. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, MM Dkt. No. 83-670, 98 F.C.C.2d 1076, 1078 n.3 (1984) [hereinafter *Television Deregulation*].

83. *Id.* at 1080–85.

84. Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Report, Gen. Dkt. No. 84-282, 102 F.C.C.2d 143, 146 (1985) [hereinafter *1985 Fairness Report.*]

reply time for opposing viewpoints on controversial issues.[85] The FCC codified the so-called personal attack and political editorializing rules in 1967.[86] The personal attack rule required broadcasters to give an individual or group personally attacked during a discussion of a matter of public importance time to reply. The political editorial rules required a broadcaster that presented an editorial policy favoring one political candidate to give reply time to the other. The Supreme Court upheld the constitutionality of these rules in *Red Lion*. Also in 1967, the FCC extended the Fairness Doctrine to cigarette advertising,[87] but abandoned this position in 1974, when it began to appear it would have to apply the doctrine to all advertising.[88] Still, the FCC insisted that the doctrine was constitutional, explaining that "the First Amendment impels, rather than prohibits, government promotion of a system which will ensure that the public will be informed of the important issues which confront it . . . . The purpose and foundation of the Fairness Doctrine is therefore that of the First Amendment itself."[89]

By 1987, the FCC had changed its mind. In 1985, the FCC explained it was "firmly convinced that the fairness doctrine, as a matter of policy, disserves the public

85. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949); *see also* Great Lakes Broadcasting Co., 3 FRC ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

86. Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates, Memorandum Opinion and Order, Dkt. No. 16574, 8 F.C.C.2d 721 (1967).

87. Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine, 8 F.C.C.2d 381 (1967).

88. Handling of Public Issues Under the Fairness Doctrine, Fairness Report, Dkt. No. 19260, 48 F.C.C.2d 1, 26 (1974); *see also* Friends of the Earth *v.* FCC, 449 F.2d 1164 (1971) (requiring fairness doctrine to be applied to advertisements for automobiles and gasoline).

89. 48 F.C.C.2d at 5-6.

interest."[90] The FCC found that the growth in the number of broadcast stations reduced the need for the doctrine, that it discouraged broadcasters from addressing controversial subjects, and that it required the government to evaluate broadcast program content; nonetheless, the FCC declined to eliminate the doctrine, concerned that it might be statutorily mandated.[91] The FCC also declined to address the argument that the doctrine was unconstitutional; the D.C. Circuit returned the case to the FCC to decide this issue.[92] Meanwhile, in another case, the D.C. Circuit had concluded that the doctrine was *not* mandated by the Communications Act.[93] On remand, the FCC reiterated its conclusion that the doctrine no longer served the public interest.[94] The FCC also concluded that the Fairness Doctrine was unconstitutional because it "chills speech and is not narrowly tailored to achieve a substantial government interest."[95] The FCC ruled that "under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the Fairness Doctrine contravenes the First Amendment and thereby disserves the public interest."[96] The FCC declared the Fairness Doctrine to be repealed. Without addressing the constitutional issue, the D.C. Circuit affirmed the FCC's decision to abandon the Fairness Doctrine on the grounds that it no longer served the public interest.[97]

90. *1985 Fairness Report*, 102 F.C.C.2d at 148.

91. *Id.* at 148.

92. Meredith Corp. *v.* FCC, 809 F.2d 863, 872 (D.C.Cir. 1987).

93. *TRAC*, 801 F.2d 501.

94. Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5066 n.120 (1987), *recon. denied*, 3 F.C.C.2d 2035 (1988).

95. 2 F.C.C. Rcd. at 5057.

96. *Id.*

97. Syracuse Peace Council *v.* FCC, 867 F.2d 654 (D.C. Cir. 1989).

Diversity of Ownership

The rationale for ownership limits in telecommunications is that changing the identity of a programmer will broaden the mix of programs. Thus, the FCC reasons that programs might be more diverse if owners of program outlets are more diverse. These ostensibly content-neutral regulations can present serious First Amendment concerns. Moreover, these regulations can have important ramifications for the anomalous restrictions on foreign ownership that the FCC imposes when it is supposedly attempting to promote diverse speech and media ownership.

Five broadcast ownership regulations directly affect diversity of programming content.[98] First, the FCC treats ownership by a racial minority as a "plus" in considering which applicant shall be awarded a broadcasting license. Second, the FCC limits the number of outlets within the same broadcast service and in the same local market that a licensee may control. Third, the FCC places a limit on the number of outlets nationwide that a licensee may own within the same broadcast service. Fourth, the FCC restricts the conditions that a television network may impose on its affiliated stations. Fifth, the FCC prohibits cross ownership of a television station and a daily newspaper in the same market.

Minority Preferences. In an attempt to broaden female and minority ownership of radio and television stations, the FCC adopted both racial and gender preferences in licensing.[99]

Initially, the FCC gave a minority applicant a preference only if he showed that his minority background would

98. Some of these regulations are discussed in KRATTENMAKER & POWE, *supra* note 22, at 89.

99. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982);

influence programming.[100] The D.C. Circuit overruled this policy in 1973 in *TV-9, Inc.* v. *FCC*, however, and held that the FCC had to grant minority preferences on the *assumption* that an applicant's minority background would influence programming.[101] The D.C. Circuit in effect forced the FCC into assuming that diverse ownership would create diverse programming.

The FCC implemented *TV-9* in 1978. First, the FCC accorded a preference to minority applicants in comparative licensing hearings where the minority owner intended to participate in the day-to-day management of the broadcast outlet.[102] Second, the FCC permitted broadcasters who faced hearings and license revocation to avoid both by selling the station at a discount to a minority-controlled group.[103] Third, the agency offered capital gain tax deferral to broadcasters who sold to minority groups.[104] After much controversy in Congress and the D.C. Circuit, the Supreme Court upheld the FCC's minority preference and distress sale policies in *Metro Broadcasting*.[105]

Paradoxically, during the same period that the FCC was encouraging minority ownership to promote diverse programming the agency also was aggressively probing foreign

100. Mid-Florida Television Corp., 33 F.C.C.2d 1, 17–18 (Rev. Bd.), *review denied*, 37 F.C.C.2d 559 (1972).

101. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

102. "Minority" was defined as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979, 980 n.8 (1978).

103. *Id.* at 983.

104. *Id.* at 982.

105. 497 U.S. 547 (1990). In reliance on *Metro Broadcasting*, the D.C. Circuit subsequently struck down the gender preference in FCC comparative licensing hearings. Lamprecht *v.* FCC, 958 F.2d 382, 386–88 (D.C. Cir. 1992) (Thomas, J.). That court ruled that the FCC had shown no evidence that women were likely to program differently from men.

ownership in television stations that proposed to provide foreign-language programming to minority audiences. Thus in one case the FCC disqualified an applicant with Taiwanese investors who proposed to provide programming in Mandarin to viewers in the greater San Francisco market.[106] In another series of cases, the FCC forced a Mexican citizen to divest his interest in Spanish-language television stations throughout the southwestern U.S.[107] The FCC's notion of diversity ended abruptly at the nation's boundaries without regard to the "paramount" right of the listener to hear what he liked, even if it had a foreign accent.[108]

Local Ownership Limits. The FCC has also established ownership limits in local markets. Specifically, the FCC proscribed common ownership of two or more AM, FM, or TV stations in the same market, as well as common ownership of a VHF station and a radio station in any local market.[109] In recognition of the need for radio stations to cut costs, the FCC subsequently loosened these rule in large markets. A single licensee may now control up to two AM and two FM stations in any market with fifteen or more stations, so long as their combined market share does not exceed 25 percent. In smaller markets, a single licensee may own up to three stations, no more than two of which may be AM or FM, so long as the

106. Pan Pacific Television, Inc., 3 F.C.C. Rcd. 6629 (1988).

107. *Seven Hills*, 2 F.C.C. Rcd. at 6876 ¶ 33.

108. *Red Lion*, 396 U.S. at 389.

109. FCC SIXTH ANN. REP. 68 (1940) (prohibiting "duopoly" in FM radio and TV); Multiple Ownership of Standard Broadcast Stations, 8 FED. REG. 16,065 (1943) (forbidding operation within same market of two AM radio or TV stations); Amendment of §§ 73.35, 73.240, and 73.646 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, Dkt. No. 18110, 22 F.C.C.2d 306 (1970), *modified*, 28 F.C.C.2d 662 (1971) (permitting existing combinations to continue and proposing to treat UHF-radio combinations on a case-by-case basis).

jointly owned stations constitute less than 50 percent of the stations in the market.[110]

National Ownership Limits. The FCC limits the number of broadcast stations that any licensee may control nationally.[111] The rules, however, leave intact affiliation agreements into which networks may enter. As a result, large owners can circumvent the limits by forming networks of affiliates.[112] FCC rules also cap television station ownership at twelve stations or any lesser number of stations that reach 25 percent of the national audience.[113] In 1995, the FCC proposed greatly increasing or eliminating this national cap for television stations.[114] As of September 16, 1994, furthermore, a single owner may have a cognizable interest in up to twenty AM and twenty FM stations, and noncontrolling interests in up to three additional stations in each service that are small businesses or minority controlled. The radio rules contain no additional limits for national audience reach.[115]

Regulation of Network Affiliations. The FCC regulates the relations between television networks and their affiliates and program suppliers. The FCC adopted network affiliate rules to

110. *See* Revision of Radio Rules and Policies, Report and Order, MM Dkt. No. 91-140, 7 F.C.C. Rcd. 2755 (1992).

111. *See* KRATTENMAKER & POWE, *supra* note 22, at 95-96.

112. *Id.* at 97.

113. Amendment of § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Memorandum Opinion and Order, Gen. Dkt. No. 83-1009, 100 F.C.C.2d 17 (1984), *on reconsideration*, 100 F.C.C.2d 74 (1984).

114. Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, MM Dkt. No. 91-221, 10 F.C.C. Rcd. 3524 (1995).

115. *See* 47 C.F.R. § 73.3555(e)(1)(i); Revision of Radio Rules and Policies, Report and Order, MM Dkt. No. 91-140, 7 F.C.C. Rcd. 2755 (1992), *recon. granted in part*, 7 F.C.C. Rcd. 6387 (1992), *further recon.*, 9 F.C.C. Rcd. 7183 (1994).

limit the ability of dominant networks to extract supposedly onerous contract terms from their affiliates. Thus, network-affiliate agreements may not prevent affiliates from broadcasting programs of another network,[116] may not confer exclusive territories on affiliates,[117] may not grant networks "options" on affiliates' time,[118] and may not prevent or hinder an affiliate from altering its rates for the sale of non-network broadcast time.[119] These rules increase diversity only in the sense that substituted programs will differ from those that might otherwise have been carried if there were no regulations. Although section 310(b) does not apply to television networks, the network affiliation rules could become a device for asserting that a foreign-owned network was impermissibly controlling its affiliates, which would, of course, be radio licensees subject to the restrictions on foreign ownership or control.

Limits on Newspaper-Television Cross Ownership. The FCC limits the ability of a single entity to own both a television station and a daily newspaper in the same city. The agency, however, generously grandfathered existing cross ownership situations at the time of the regulation's promulgation. Thereafter, the FCC has allowed waivers of this rule on a case-by-case basis.

This rule is significant to the foreign ownership restrictions in several respects. First, foreigners face no impediment to owning newspapers in the U.S. Second, the newspaper-television cross ownership rule is an ostensibly content-neutral regulation of industry structure that the D.C. Circuit has recognized can be enforced by the FCC in a content-based manner. Third, the FCC's application of the rule to Rupert Murdoch's News America was found to violate the First

116. 47 C.F.R. § 73.658(a).
117. *Id.* § 73.658(b).
118. *Id.* § 73.658(d).
119. *Id.* § 73.658(h).

Amendment because it was intended to silence Murdoch based on his political views or national origin.

In *News America Publishing, Inc.* v. *FCC*,[120] the agency argued that *Syracuse Peace Council* rested narrowly on the "conclusion . . . that scarcity did not justify content regulation," and that the decision was therefore irrelevant to "structural regulation of ownership requirements,"[121] such as the newspaper-television cross ownership rule invoked against Murdoch.[122] Writing for the D.C. Circuit, Judge Stephen Williams intellectually devastated the FCC's claim that structural broadcast regulation should automatically receive a less intense standard of judicial review than content regulation. Even content-neutral FCC regulations that purport to address solely matters of market structure must be scrutinized "under a test more stringent than the 'minimum rationality' criterion typically used for conventional economic legislation under equal protection analysis."[123] Judge Williams characterized broadcast regulation as a continuum, such that ostensibly structural regulations can have the practical effect of restricting broadcasters' freedom of speech: "Clearly one can array possible rules on a spectrum from the purely content-based (e.g., 'No one shall criticize the President') to the purely structural (e.g., the cross-ownership rules themselves)."[124] Along that continuum, a structural prohibition may be "structural only in form," revealing "well recognized ambiguities in the content/structure dichotomy."[125] *News America*, therefore, repudiated the FCC's assertion that

120. 844 F.2d 800 (D.C. Cir. 1988).

121. Brief for the Federal Communications Commission at 20, News Am. Publishing, Inc. *v.* FCC, 844 F.2d 800 (D.C. Cir. 1988) (No. 88-1037).

122. 47 C.F.R. § 73.3555(c).

123. *News America*, 844 F.2d at 802; *see also id.* at 814.

124. *Id.* at 812.

125. *Id.* (citing Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978)).

structural regulation is qualitatively different from content regulation. Instead, the decision implied what some economists long had argued: economic freedom and freedom of speech are inextricably linked.[126]

This more demanding standard of judicial review under the First Amendment eventually will topple the fallacy of spectrum scarcity and, with it, the many statutes and FCC regulations artificially constraining the structure of the telecommunications industry in the name of promoting diversity of expression. The foreign ownership restrictions exemplify the numerous regulatory policies that rest ostensibly on the rationale that, to promote "diversity of expression," government must allocate spectrum and regulate the industrial organization of telecommunications markets in a manner that is not neutral with respect to the identity and message of the person licensed to speak.

Summary. The FCC's regulations attempt to promote diversity of programming through rules concerning actual program content, ownership of media outlets, and program acquisition. As the *News America* case makes clear, these regulations are susceptible to enforcement against foreigners (and even naturalized Americans, such as Rupert Murdoch) in a manner that violates the First Amendment.

CABLE TELEVISION

Proponents of regulating cable television have tried to justify reduced levels of First Amendment scrutiny for such regulations by analogizing cable to broadcast television. The analogy

126. *See* OWEN, *supra* note 60, at 21–24, 26–28; R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROC. 384 (1974); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 3–7 (1964). *See generally* Thomas G. Moore, *An Economic Analysis of the Concept of Freedom*, 77 J. POL. ECON. 532 (1969).

is immediately problematic because cable television differs technologically from traditional broadcast television. Terrestrial broadcasting transmits electromagnetic signals to all persons within the broadcaster's service contour who have television receivers and antennae. Cable television operators transmit signals through fiber-optic or coaxial cables laid to the subscribers premises. As discussed above, the federal government regulates broadcasting far more intrusively than print. The arguments for regulation of cable television revolve around scarcity and notions that cable occupies government property.

Scarcity

We have already considered and rejected the scarcity rationale for broadcast regulation. Different versions of the scarcity argument have been advanced to justify cable regulation as well, but they are inapplicable for technological reasons and for the general theoretical reasons already discussed in connection with broadcasting.

Scarcity Rationales. One can envision five different versions of "scarcity."[127] The first form is "static technological scarcity," which refers to the problem of interference when multiple broadcasters transmit on the same frequency. The argument from static technological scarcity is that regulation prevents overlapping transmissions and thus prevents chaos on the air.[128] This type of scarcity is irrelevant to cable television because cable companies use specific, shielded cables that prevent overlap between systems. Competing entities could only interfere with each other's programming by sharing a single cable, which never happens because the cables are private

127. The scarcity nomenclature used in this section is derived from THOMAS W. HAZLETT & MATTHEW L. SPITZER, CABLE TELEVISION REGULATION AND THE FIRST AMENDMENT ch. 4 (MIT Press & AEI Press forthcoming 1995).

128. *NBC*, 319 U.S. at 212; *Red Lion*, 395 U.S. at 375–78.

property.

The second form of scarcity, "dynamic technological scarcity," is the notion that the broadcast spectrum will eventually be exhausted because it is inherently finite—one cannot produce more spectrum. This form of scarcity also fails when applied to cable, however, because one can always manufacture more cables. The resources required to manufacture fiber-optic or coaxial cable are no more limited than are those used to produce paper. Also, the use of digital compression will permit existing cables to have far greater capacity.

"Excess demand scarcity" is a third scarcity concept connoting that more people wish to have spectrum rights than there are possible rights to distribute.[129] There is no excess demand for cable television systems or for the cable equipment with which to build them, however, because both are allocated through the market at market-clearing prices.

The fourth form of scarcity, "entry scarcity," refers to the argument that broadcasting should be licensed because entry is more difficult than into the print media.[130] This argument is circular: The primary obstacles to entry in broadcasting are the burdensome regulations and restrictions on entry themselves. Even so, this form of scarcity barely applies to cable. The productive elements of a cable television system are distributed through the market, without onerous FCC restrictions on transfers. Cities do license large cable systems, but this cannot serve as a justification for regulation: it is the *product* of regulation. The only similarity for scarcity purposes between broadcasting and cable television is that large amounts of capital are required for both. Yet the same is true for a large print institution, such as the *New York Times*.

The last scarcity rationale, "relative scarcity," main-

129. *Red Lion*, 395 U.S. at 398-99. The FCC calls this "allocational scarcity." Syracuse Peace Council, 2 F.C.C. Rcd. at 5048-49 ¶¶ 37-39.

130. Berkshire Cablevision *v.* Burke, 571 F. Supp. 976, 987 n.10 (D.R.I. 1983), *aff'd*, 773 F.2d 382 (1st Cir. 1985).

tains that broadcast spectrum is substantially more scarce than paper. The argument, however, overlooks that one cannot quantify "units" of spectrum in comparison to units of paper, or cable, without considering the ultimate purpose that those units will serve. Often, only one medium is suitable for a particular job: one cannot broadcast music through paper. This scarcity rationale compares the incomparable.

Scarcity in the Courts. The federal courts have generally refused to accept scarcity as a justification for limiting the speech of cable television operators.[131] So did the major case involving First Amendment protection of cable television, the Supreme Court's 1994 decision in *Turner Broadcasting System, Inc.* v. *FCC.*[132]

In *Turner*, the Court considered the constitutionality of the "must-carry" rules in the Cable Television Consumer Protection and Competition Act of 1992.[133] These rules required cable systems to set aside a portion of their channels for retransmission of local broadcast programming. The D.C. Circuit had already struck down must-carry rules under the First Amendment in two earlier cases. In *Quincy Communications Corporation* v. *FCC*,[134] the court struck down must-carry rules because the FCC failed to justify its position that permitting cable operators to refuse local programming would threaten over-the-air broadcasting. In response to *Quincy*, the FCC formulated temporary must-carry rules that, in part, required cable operators to provide consumers with A/B switches,

131. Preferred Communications, Inc. *v.* City of Los Angeles, 754 F.2d 1396, 1402-05 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); Omega Satellite Prods. Co. *v.* City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Home Box Office, Inc. *v.* FCC, 567 F.2d 9, 44-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

132. 114 S. Ct. 2445 (1994).

133. Pub. L. No. 102-385, 106 Stat. 1460 § 4 (1992) (codified at 47 U.S.C. §§ 534-35).

134. 768 F.2d 1434 (D.C. Cir. 1985).

which would allow consumers to choose between using the cable feed and a rooftop antennae. The FCC deemed that the interim rules should stay in effect for five years—for consumers to learn how to use a switch. The court struck down the interim rules in *Century Communications Corporation* v. *FCC*[135] because it rejected the FCC's conclusion that it would take five years for consumers to grasp the use of an A/B switch.

The Court in *Turner* set forth some unanimous propositions before discussing scarcity. First, the Court held that cable television is protected by the First Amendment,[136] and that the must-carry rules restricted speech in two ways: "The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining."[137] Second, the Court agreed that cable, which often has a local monopoly, controls a type of transmission bottleneck—that is, cable has the ability to prevent entry of non-cable signals to the market comprising cable subscribers.[138] Third, the Court found that Congress passed the must-carry provisions to curb cable operators' potential monopoly power to reduce the supply of programming sources.[139]

The Court then rejected the government's argument that, because cable suffered from the same scarcity problems as did broadcasting, the Court should review the must-carry rules under intermediate scrutiny. The majority asserted:

> The broadcast cases are inapposite in the present context because cable television does not

135. 837 F.2d 517 (D.C. Cir. 1988).
136. *Turner*, 114 S. Ct. at 2456.
137. *Id.*
138. *Id.* at 2466.
139. *Id.* at 2454-55, 2467.